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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/761,694	01/18/2001	Piergiovanni Luciano	SIR004BUS/RF/vm	4696

466 7590 11/28/2003

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EXAMINER	
BECKER, DREW E	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 11/28/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/761,694	LUCIANO ET AL.	
	Examiner	Art Unit	
	Drew E Becker	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 July 2003* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-25 and 27-29* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-25 and 27-29* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 1-3, 8-9, 12, 14-15, 20, 22, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ueda et al [Pat. No. 4,959,207] in view of EP 0849309A1. Ueda et al teach a food tray (column 7, line 3) comprising a foamed, thermoplastic sheet (column 5, line 33) impregnated with a deodorant composition (column 5, line 15), apertures (column 6, line 43), the deodorant composition including known deodorants (column 5, line 15), the use of known deodorants such as activated carbon, alumina, zeolite, clay, bentonite, and diatomaceous earth in powder form (column 5, lines 35-40), the thermoplastic material including polystyrene (column 5, line 68), and the odor adsorbing material being present at 0.1-30% (column 5, line 44). Ueda et al do not teach open cells or surfactants. EP 0849309A1 teaches a food package comprising open cell, foam thermoplastic material (column 1, lines 6-9) impregnated with surfactants (column 3, lines 23-38). It would have been obvious to one of ordinary skill in the art to incorporate the open cell plastic of EP 0849309A1 into the invention of Ueda et al since both are directed to foam food trays, since Ueda et al already included a foamed, thermoplastic sheet (column 5, line 33), since open celled thermoplastic was commonly used for food trays which contained foods which release blood and other

undesirable liquids, and since EP 0849309A1 teach that a high percentage of open cells provided an increased absorption capacity for liquids (column 4, line 32). It would have been obvious to one of ordinary skill in the art to incorporate the surfactants of EP 0849309A1 into the invention of Ueda et al since both are directed to foam food trays, since Ueda et al included apertures as well as the use of other additives (column 6, line 44; column 5, lines 14-16), since food trays were commonly used to package wet or greasy materials, and since the surfactants of EP 0849309A1 helped absorb these fluids (column 3, lines 23-38) and thereby kept the tray looking presentable to the consumer (column 1, lines 3-17).

3. Claims 4 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ueda et al in view of EP 0849309A1 as applied above, and further in view of JP 61120638.

Ueda et al and EP 0849309A1 teach the above mentioned components. Ueda et al also taught the use of deodorant materials such as zeolite and clay (column 5, line 38). Ueda et al and EP 0849309A1 do not teach the use of zeolite or clay with an average particle size of 0.5-100 μm. JP 61120638 teaches a food package comprising a foamed sheet with odor adsorbing particles having a size of 150 μm or finer (page 1, claim 1; page 5, line 4) and the odor absorbing particles including clay and zeolite (page 4, line 11). It would have been obvious to one of ordinary skill in the art to incorporate the particle size of JP 61120638 into the invention of Ueda et al since both are directed to food packages, since Ueda et al already included the use of deodorant materials such as zeolite and clay (column 5, line 38) and taught that known deodorants could be included

with the deodorant composition (column 5, line 15), since Ueda et al simply does not recite a particle size, since odor adsorbing particles with a size of 150 μm, or finer, were quite suitable for use in foamed sheets as shown by JP 61120638 (page 4, lines 1-10), and since JP 61120638 teaches that if particles larger than this are used, mixing properties are poor, package contents can be contaminated, and the adsorption function cannot be effectively exhibited (page 4, line 10-15).

4. Claims 5-7, 10-11, 13, 17-19, 21, 23, 25, and 27-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ueda et al, in view of EP 0849309A1 and JP 61120638, as applied above, and further in view of JP 363150353A.

Ueda et al, EP 0849309A1, and JP 61120638 teach the above mentioned components. EP 0849309A1 also teaches upper and lower plastic coatings (Figure 3, #6-7), the apertures extending only partly through the tray (Figure 3, #4), and the open cells comprising at least 85% of the sheet (Figure 3, #5; column 6, line 5). Ueda et al, EP 0849309A1, and JP 61120638 do not teach 1.5-4% aluminum oxide. JP 363150353A teaches a food tray comprising a foam sheet with aluminum oxide impregnated within it (page 2, line 10) in the range of 3-10% (page 2, line 14). It would have been obvious to one of ordinary skill in the art to incorporate the aluminum oxide of JP 363150353A into the invention of Ueda et al, in view of JP 61120638 and EP 0849309A1, since all are directed to food packages comprising foam sheets with odor adsorbing material, since Ueda et al already included alumina as an odor adsorbing material (column 5, line 37) and taught that known deodorants could be included with the deodorant composition

(column 5, line 15), and since aluminum oxide was a commonly used odor adsorbing material for food packages as shown by JP 363150353A.

Response to Arguments

5. Applicant's arguments filed July 28, 2003 have been fully considered but they are not persuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant argues that Ueda et al does not disclose a food tray. However, Ueda et al explicitly recites a "food tray" (column 7, line 3).

Applicant argues that JP 363150353A does not teach 3-10% aluminum oxide by reasoning that diatomaceous earth contains only 4% aluminum oxide. However, JP 363150353A does not recite "only 4% aluminum oxide" and the examiner wonders where applicant found this information.

Applicant argues that JP 363150353A does not teach particle size or surfactants. These issues were addressed in the previous parent claims which were rejected under Ueda et al in view of EP 0849309A1 and JP 61120638, as explained above.

Applicant argues that the references do not teach the property of adsorption. However, the same materials were used in the same amounts and therefore would have

inherently exhibited the same properties, regardless of whether they were explicitly stated or not.

Regarding Ueda et al, applicant argues that Ueda et al do not teach the use of known deodorant materials within the composition. However, Ueda et al do teach this at column 5, line 15 where it is disclosed that the deodorant composition may include known deodorant materials; and also at column 5, lines 35-41 where it is disclosed that materials such as zeolite, clay, and alumina are known deodorant materials.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument that EP 0849309A1 could not be combined with Ueda et al, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Conclusion

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 703-305-0300. The examiner can normally be reached on Monday-Thursday 8am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1495.

Drew E Becker
Examiner
Art Unit 1761